

9/9/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
AVRIL, INC.,) IF&R Docket No. III-441-C
)
Respondent)

ORDER DISPOSING OF OUTSTANDING MOTIONS

There are currently pending three motions filed by the Respondent Avril, Inc. (Respondent or Avril): a motion for leave to file an Amended Answer; a motion to strike certain exhibits; and a motion requesting permission to take depositions. Complainant has filed a response to these motions opposing certain of the relief requested but presenting no objection to other portions of the motions. The motions will be dealt with seriatim.

I. Motion for Leave to File Amended Answer

The basis for Respondent's motion seeking leave to file an Amended Answer is that Avril was not represented by counsel when the original Answer was filed and that, as a result, that Answer fails to comport with the standards set forth in Section 22.15(a)-(c) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.15(a)-(c). The motion avers that no demonstrable prejudice will result from accepting the Amended Answer. The Complainant does not object to the granting of the motion provided that the original Answer is not stricken from the record and that the record reflect that the Amended Answer is a supplement to, not in lieu of, the original Answer, including any admissions therein.

Since good cause has been shown, Respondent's motion for leave to file an Amended Answer is granted, and the Amended Answer attached thereto is accepted for filing. With regard to Complainant's reservations, it should be noted that, while the original Answer is not stricken from the record, the Amended Answer should be considered as substituted for the original Answer. With regard to any admissions allegedly made in the original Answer, that will be dealt with as an evidentiary matter at the appropriate time, should the Complainant seek to rely on any of these alleged admissions.

II. Motion to Strike Exhibits

The Respondent's motion does not seek to strike an entire exhibit but rather seeks to strike certain documents that are part of Complainant's Exhibit I, filed with the Complainant's prehearing exchange. The four documents are identified as follows:

- a. Letter to Michael Guilday, Avril Inc., from Joseph Uram, Commonwealth of Pennsylvania Department of Agriculture dated October 22, 1990 regarding the product Bio-Trol.
- b. History of Official Sample Sheet for Bio-Trol D, EPA Registration No. 5734-6, Sample No. SM 9007JKL13, undated.
- c. Pennsylvania Department of Agriculture Bureau of Plant Industry Report of Pesticide Analysis for Bio - Trol, EPA Registration No. 5734-6, dated October 15, 1990.
- d. Physical establishment inspection report, Inspection No. EPA F2305 by Inspector James R. Lorah, undated.

The motion to strike avers that the four documents relate only to the product Bio-Trol D, which is not at issue.

Complainant, in its response to the motion to strike, does not contest striking the first three documents identified above but does object to striking the establishment inspection report by Mr. Lorah. Complainant argues that that inspection report relates to the inspection conducted by Mr. Lorah on May 9, 1990 at the Respondent's facility, which inspection gave rise to this enforcement action. Accordingly, Complainant argues that the document is relevant and should not be stricken from Complainant's Exhibit 1.

With regard to the first three documents identified above, there is good cause to strike those documents and the motion is granted with regard thereto. Accordingly, the documents identified as a, b and c above are hereby ordered stricken from the record. However, Complainant's position is better taken with regard to the May 9, 1990 inspection report, which appears to be a relevant document and should not be stricken. Accordingly, Respondent's motion to strike with regard to that inspection report is denied.

III. Motion to take Depositions

The Respondent in its motion seeks leave to take depositions of seven individuals who are either agents, employees, or former employees of the Complainant. The motion alleges that these individuals possess knowledge relating to EPA's compliance practices generally and to the investigation of the product involved in this enforcement action, including, but not limited to, the inspection of the Avril facility involved and the

resulting findings and conclusions. Respondent avers that the Complainant has denied a request to interview these individuals informally and therefore asserts that the taking of the depositions is necessary in order for the Respondent to represent its interest adequately.

Complainant opposes Respondent's motion to take depositions on the basis that the Complainant does not intent to call any of the individuals, except Mr. John R. Lorah, as a witness since any testimony they might provide would be of little, if any, relevance. For this reason, Complainant also objects to the Respondent's identification of these individuals as witnesses in its prehearing exchange. Complainant argues that there is no constitutional right to pre-trial discovery in administrative proceedings and cites a provision in Section 22.19(f)(1) of the Rules that discovery beyond the prehearing exchange is only permitted when there is a determination: that such discovery will not unreasonably delay the proceeding; that the information is not otherwise attainable; and that the information has significant probative value. Complainant further notes that, under 22.19(f)(2) of the Rules, depositions shall be ordered only upon showing a good cause and a finding that the information cannot be obtained by alternative methods or that there is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation at hearing. Complainant argues that Respondent has not made the appropriate showing that the information sought from the proposed

deponents, except Mr. Lorah, has significant probative value. Complainant notes that most of the proposed testimony would bear on the inter-agency and intra-agency procedures for referring cases for potential enforcement or on EPA policy on FIFRA compliance in general, which is so vague that it does not contain significant probative value.

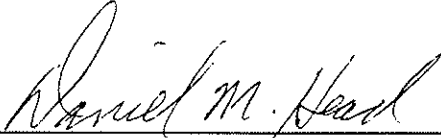
Further, Complainant argues that Respondent has not shown that the information it seeks from the depositions is not obtainable by other methods, as required by Section 22.19(f)(1) and (2) of the Rules. Complainant asserts that any information possessed by any of those individuals may be obtainable by interrogatories. Complainant points out that, as to Mr. Lorah, he will be presented as a witness at hearing and subject to cross-examination by Respondent. Complainant further contends that taking depositions of certain individuals would unreasonably delay the proceeding.

On analysis, it would appear that the Complainant's position is better taken. The Respondent has made no showing that the information sought with regard to the proposed witnesses could not be secured by the filing of interrogatories or other appropriate means of discovery. It would appear that the appropriate use of alternate discovery could determine the relationship of the seven individuals to this particular proceeding and whether they have any evidence that might be of probative value in this cause. Based on the pleadings presented today, the only the witness definitely having being established

as having information is Mr. Lorah and, with regard to him, the use of interrogatories or other discovery could possibly secure information adequate for the Respondent to prepare for hearing.

Accordingly, the Respondent's motion to take depositions is denied. However, this denial is without prejudice to the motion being renewed if Avril can show good cause for the need to take depositions after it has sought to obtain the information by other appropriate means of discovery. In this latter regard, to save the need for further pleading, it will be considered that the Respondent's motion is a motion seeking leave to file interrogatories relating to the involvement of the seven witnesses identified as potential deponents. Such permission is hereby granted, without the need for the Respondent to file a further motion seeking permission to propound interrogatories. Moreover, to insure that this proceeding will advance with due dispatch, Respondent is given until October 15, 1993 to submit any interrogatories relating to the seven witnesses identified in the motion for leave to take depositions.

SO ORDERED.



Daniel M. Head
Administrative Law Judge

Dated: _____

September 9, 1993
Washington, DC

IN THE MATTER OF MATTER OF AVRIL, INC., Respondent
IF&R Docket No. III-441-C

CERTIFICATE OF SERVICE

I certify that the foregoing Order Disposing of Outstanding Motions, dated September 9, 1993 was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

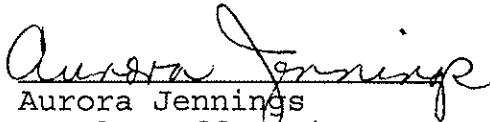
Ms. Lydia A. Guy
 Regional Hearing Clerk
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 841 Chestnut Building
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Copy by Certified Mail
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 Aurora Jennings
 Legal Staff Assistant
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 Law Judges

Dated: September 9, 1993
 Washington, D.C.